NO. 22488

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MILO GILBERT,

Appellant,

vs.

UNITES STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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In Walsh v. United States, 374 F. 2d 421, 426 (March 3, 1967), this Court held that:

" . . . Although we do not reach the question, it APPEARS LIKELY that a contrary result would run afoul of the CONSITUTIONAL PROTECTION against double jeopardy. Ex parte Lange, supra; Green v. United States, supra . . . (Emphasis supplied by appellant)

The question before this Court today is not whether a greater punishment can be inflicted on a defendant on retrial after a reversal but whether a greater punishment has been inflicted on

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The question before this Court today is not whether a greater punishment can be inflicted on a defendant on retrial after a reversal but whether a greater punishment has been inflicted on

the appellant as a result of the count for count sentence at the first trial.

This Court, in Gilbert v. United States, 359 F. 2d 285, 288, rejected the appellant's assertion that "none of the charges was weighed independently, but rather the 'cumulative guilt' of the appellant in the case as a whole, as a gestalt, was the nature of the judgment reached." The Court further stated; "Certainly, the comments of the trial judge DO NOT BEAR OUT Gilbert's assertion." (Emphasis supplied by appellant)

Appellant urges that this Court, in Gilbert v. United States, supra, ruled that the Law of the Case" was that each count was treated independently, individually or as a single unit, in the finding of guilt. As such, the sentence imposed on appellant was also on a count for count basis.

Therefore, it becomes necessary only to examine whether on retrial the trial judge could increase the sentence on the individual counts, not on the multiplicity of counts as a general sentence and as the Government asks this Court to do when they state that "no greater punishment was in fact inflicted."

Appellant ACTUALLY COMMENCED service of the sentence imposed at the first trial. He was placed in the Los Angeles County Jail as Judge Yankwich continued a motion for bail pending appeal. Appellant did not ELECT NOT TO SERVE, as was required under the law at that time. He has received full credit for the time spent in jail before being released on bail, approximately one (1) week later. The time spent in the County Jail is

A PART AND PARCEL of any subsequent sentence which would be imposed at a retrial as a result of a reversal.

The Government's position that the citing of Oksansen v. United States, 362 F. 2d 74 (8th Cir. 1966), cert. denied 385 U. S. 840; United States v. Sacco, 367 F. 2d 368 (2nd Cir. 1966); and United States v. Adams, 362 F. 2d 210 (6th Cir. 1966), is not in holding with appellant's position is, without question, in error and without merit. The Government has indulged itself in flights of pure fantasy and speculation in attempting to condone an arbitrary, capricious and unconstitutional act by the trial judge, designed purely to "punish" the defendant who has asserted his right to appeal, and successfully. In attempting to disqualify the above cited cases, the Government asks this Court to believe that a different situation exists insofar as the appellant's position of not permitting an increased sentence at retrial. In appellant's case, the sentence had commenced when appellant was remanded to the County Jail after sentence had been imposed. In each of the above-cited cases service of the sentence HAD COMMENCED. It makes no difference whether appellant served one (1) day, one (1) month or one (1) year before the reversal. He HAD COMMENCED SERVICE OF HIS SENTENCE.

In Adams, supra, the Court, at page 211, stated:

" . . . When the defendant was removed to the federal penitentiary, and started to serve his sentence, he was in jeopardy in the constitutional sense . . . "

In Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872 (1874), the United States Supreme Court said:

> ". . . It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But, if after judgment has been rendered on the conviction, and the SENTENCE OF THAT JUDGMENT EXECUTED on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated AS IF A NEW TRIAL HAD BEEN HAD, AND ON A SECOND CONVICTION A SECOND PUNISHMENT INFLICTED?
>
> ". . . The argument seems to us irresistible, and we do not doubt that the Constitution was DESIGNED as much TO PREVENT the criminal from being TWICE PUNISHED FOR THE SAME OFFENSE as from being twice tried for it. . . ." (Emphasis supplied by appellant)

If the appellee's theory is allowed to stand then one charged under law, who succesfully appeals, is compelled to pay a terrible price for exercising his constitutional right to appeal. A coercion will now exist in this Circuit to forego the right to appeal in the fear of an increased punishment for seeking reversal.

In Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), Judge Sobeloff wrote:

> " . . . This is like the 'grisly choice' disountenanced in Fay v. Noia, 373 U.S. 391 (1963). 'The law should not, and in our judgment DOES NOT, place the defendant in such an incredible dilemma.' Green v. United States, 355 U.S. 184 (1957) . . . " (Emphasis supplied by appellant)

In Green v. United States, supra, 355 U.S. 184 (1957), the United States Supreme Court said:

> " . . . (T)he import of the (District) Court's ruling was to condition his constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. THUS, THOUGH NOT SO INTENDING, THE COURT 'POTENTIALLY PENALIZED' HIM FOR ASSERTING THE PRIVILEGE. THIS THE LAW 'FORBIDS' . . . " (Emphasis supplied by appellant)

This Court is now faced with the "grisly choice" of allowing the present sentence, imposed at a retrial and increased on each individual count after THE FIRST SENTENCE HAD BEEN COMMENCED, to stand or to order a proper correction of the sentence to that of the original one, COUNT FOR COUNT, which CANNOT exceed one (1) year and one (1) day on each count.

The Government offered this Court a second point: that a

greater punishment MAY BE inflicted upon the defendant after retrial and relies SOLELY on the oft-cited, but OUTDATED, Stroud v. United States (1919), 251 U.S. 15, 64 L.Ed.103, 40 S.Ct. 50.

In Patton v. North Carolina, supra, 381 F.2d 636 (4th Cir. 1967), Judge Sobeloff succulently states:

> " . . . From a reading of the Stroud opinion, it appears that the case WAS ARGUED to the Court on the THEORY that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder. THERE IS NO INDICATION THAT THE COURT WAS 'PRESENTED' WITH THE ARGUMENT THAT THE RISK OF AN 'INCREASED PENALTY' ON RETRIAL VIOLATES THE DOUBLE JEOPARDY CLAUSE BY BEING A DOUBLE PUNISHMENT FOR THE SAME OFFENSE. Stroud thus stands for NO MORE than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution . . . " (Emphasis supplied by appellant)

One, certainly, must give substantial weight to Judge Sobeloff's opinion. It is a work of considerable effort and meaning and it embodies the very principles of double jeopardy as to the protection offered a defendant AGAINST an increased sentence

after a reversal and retrial.

In the First Circuit, the Court stated in Marano v. United States, 374 F. 2d 583, 585:

> " . . . As we have recently held, a defendant's right of appeal MUST BE UNFETTERED . . . So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he NOT BE FACED with such certainty . . . he likewise SHOULD NOT HAVE TO FEAR even the POSSIBILITY that his exercise of his right to appeal will result in the imposition of a direct penalty for doing so . . . " (Emphasis supplied by appellant)

The Court, in Marano v. United States, Ibid, refutes the Government's point that the total of five (5) years appellant is now serving is not an increase in the punishment.

Justice Traynor, in People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963), speaking for the majority held that "an accused MAY NOT BE GIVEN a more severe sentence on retrial obtained after a successful attack on his first conviction." The Court, in overruling the case of People v. Grill, 151 Cal. 592, 91 Pac. 515, pointed out that the United States Supreme Court had held that the double jeopardy clause precluded

convicting a defendant of a higher degree of a crime after he had secured a reversal of his conviction of the lower degree. As such, the Court (Justice Traynor) analogized that case, Green, supra, to the instant situation, Henderson, supra, and declared that since the Green case and a California case following that Supreme Court decision, Green has now established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, the RATIONALE of the case of Stroud v. United States, supra, and People v. Grill, supra, HAS BEEN VITIATED. (See In Re Ferguson, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); People v. Nanga-Parbet Ali, 50 Cal. Rptr. 751, 754 (1967).

When the appellant suffered a first conviction the punishment was one (1) year and one (1) day, on each count, to run consecutively. Appellant ACTUALLY COMMENCED SERVICE OF THAT SENTENCE, so that when the reversal came he would be ENTITLED TO CREDIT spent in jail if, on retrial, another conviction resulted.

This Court has joined, in Walsh v. United States, supra, with the First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits in ruling that a sentence CANNOT be increased on retrial, once it has commenced. The Draconian doctrine which Judge Carr set forth, and is now urged by the Government, is hardly realistic nor is it legal. The rationale presented by the Government cannot be held to be anything but sheer sophistry.

True, thirty-one (31) years and thirty-one (31) days is far greater than five (5) years. But this is as a whole, as a general sentence. This Court ruled that each count was weighed INDE-

PENDENTLY. As such, each count had to receive a sentence independent of the other. Judge Yankwich chose to run the sentences consecutively; this was his choice. Judge Carr chose to run the sentences concurrently; this was his choice. But Judge Carr could not increase EACH sentence on the individual counts. To effect the sentence he had in mind, five (5) years, he had to sentence appellant to one (1) year and one (1) day, consecutively, on five (5) counts. This he did not do. His sentence, therefore, was illegal since it was against the "Law of the Case", set forth by this Court.

CONCLUSION

In essence, the sum and substance of this entire argument and appeal summarizes to a simple question:

> Can a defendant sentenced separately on a multi-count indictment to consecutive sentences of one (1) year and one (1) day on each count, and who successfully obtains reversal of those convictions and on retrial is acquitted of many of the original counts, has others dismissed, but is convicted of some counts involved in the original conviction, and actually commenced service of the original sentences before he was admitted to bail pending the first appeal, incur a longer sentence on EACH of the retried counts merely because those longer sentences were to be served concurrently and, therefore, did not exceed the

original sentences made consecutively?

It is submitted to this Court that, when the component parts of the issues are broken down and examined, the answer must be a clear and resounding NO.

To quote the appellee, in Ray v. United States, 372 F. 2d 80, 83, this Court stated:

> ". . . When the District Court imposes sentence on a multiple count indictment, it is HIGHLY DESIRABLE that he deal SEPARATELY with EACH COUNT. See Benson v. United States, 332 F. 2d 288 (5th Cir. 1964). . . . In McDowell v. Swope, 183 F. 2d 856 (9th Cir. 1960), this Court stated at page 858:
>
> > ' * * * the loose practice of imposing a general sentence is definitely to be DISCOURAGED. '
>
> . . . We believe it appropriate at this time to ISSUE a SIMILAR ADMONITION . . . (Emphasis supplied by appellant)

From a detailed reading of appellee's brief, page 10, it becomes quite evident that they have misquoted the Ray case under sentences one (1) through four (4). Nowhere in the Ray case can appellant find the words:

> ". . . That the trial court need not treat the various counts of the indictment separately at the time of sentencing is evidenced further by the fact that the court

may impose a general sentence covering all counts, rather than an individual sentence for each count . . ."

It becomes more and more evident that, after a thorough reading of the appellee's brief, the Government has supported appellant's claim before this Court.

This Court has ruled that increased punishment should not be imposed, as well, and has, as evidenced by the Ray case, admonished the lower courts for exactly what is now before this Court.

This Court now has the opportunity to awaken the awareness of the ideal of equal justice under law.

If this ruling, as set forth by Judge Carr, is now permitted to stand, the Court may escape the prohibition from harsher penalty after retrial by merely changing the total cumulative sentence where more than one (1) count is involved.

The present sentence was harsher for no discernible reason. This WAS NOT a case where additional charges were had at the retrial. If anything, the counts were far less. This WAS NOT a case where new evidence was presented. This WAS NOT a case where the sentencing judge had new evidence as to the pre-sentence investigation report. It was a case where the sentence was increased as a PENALTY for asserting the right of appeal successfully.

Appellant was originally arrested on January 2, 1959 and was released on bond pending trial on January 5, 1959. Upon conviction after his first trial, he was sentenced on January 22, 1960 and was remanded to custody immediately and commenced serving

his sentence. Subsequently, on or about January 28, 1960 he was released on bond pending appeal; and resumed serving his sentence on December 5, 1966.

Appellant is now serving the sentence which started after the first trial. He returned to custody on December 5, 1966. True, it is not the same sentence but SERVICE HAD COMMENCED. By this very fact, he is PROTECTED AGAINST AN INCREASED SENTENCE at retrial under the Double Jeopardy clause.

Appellant respectfully and strongly urges that he HAS NOW SERVED WELL BEYOND the one (1) year and one (1) day, and thus he HAS COMPLETED HIS LEGAL SENTENCE.

HE IS NOW ENTITLED TO HIS FREEDOM.

Respectfully submitted,

EDWARD J. SKELLY

Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward J. Skelly

EDWARD J. SKELLY